

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



DVP. ORIG.

74-2559

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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RAYMOND J. MILLS

Plaintiff-Appellant

and

HARRY F. SIMMONS

Plaintiff

-against-

74-2559

THE LONG ISLAND RAILROAD COMPANY,  
HAROLD J. PRYOR, THOMAS J. BUTLER,  
WALTER DAY, MERRILL J. PIERCE,  
MARTIN BURKE, JAMES MOORE, SAL  
BARBUTO, constituting majority of  
the officers of UNITED TRANSPORATION  
UNION (T),

Defendants-Appellees

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REPLY BRIEF OF PLAINTIFF-  
APPELLANT, RAYMOND J. MILLS

JOSEPH P. NAPOLI  
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Plaintiff-Appellant,

and

HARRY F. SIMMONS,

Plaintiff,

-against-

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REPLY BRIEF OF PLAINTIFF-  
APPELLANT, RAYMOND J. MILLS

The United Transportation Union and The Long Island Railroad Company continue to erroneously claim as they did in the District Court that the administrative remedies of Section 3 of the Railway Labor Act, 45 U.S.C. §153 and the remedies provided under the letter agreements are the appellant employee's exclusive remedies.

In Jones v. Trans Wor'l Airlines, Inc., 495 F.2d 790 (2nd Circ. 1974), this Court rejected a similar contention with the following statement:

"[2] An employee cannot prosecute a complaint against his collective bargaining agent by resorting to the remedies provided in section 3 of the Railway Labor Act. 45 U.S.C. § 153 (1970). Section 3 First (i) of the Act provides only that disputes between an 'employee or group of employees and a carrier or carriers' may be referred to the Adjustment Board. Conley v. Gibson, 355 U.S. 41, 44, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Cunningham v. Erie R.R., 266 F.2d 411, 414-415 (2d Cir. 1959).

In this case, the appellants challenge the validity of the 1970 contract as it is applied to them. They claim that the 1970 contract, though fair on its face, is being enforced and administered in a discriminatory manner.

[3] The appellant employees were not required to exhaust the contract grievance procedure provided in the 1970 collective bargaining agreement. Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 329-330, 89 S.Ct., 548, 21 L.Ed.2d 519 (1969). Were the rule otherwise, the passenger relations agents would be remanded to a remedy administrated and prosecuted by their adversary, the IAM. Pursuit of the contract remedy in this case would have been futile."

In addition, the exhaustion of administrative remedies is never required where a challenge is made to the constitutionality of the procedures of a given agency.

In Finnerty v. Cowen, \_\_\_\_ F.2d \_\_\_\_ (2d Cir. 1974) [#74-1668, 2/16/74] this Court reversed and remanded the District Court's dismissal of appellant's action to enjoin

as unconstitutional the operation of certain sections of the Social Security & Railroad Retirement Acts which require reduction of annuities to offset the earnings of recipients. This Court held that the exhaustion of administrative remedies was not required because appellant's challenge to the constitutionality of the defendant's recoupment techniques and the Acts could not be decided upon by the agencies themselves.

In the case at bar, plaintiff Mills has challenged the constitutionality of the letter agreements asserting that enforcement of the provisions included therein have resulted in a denial of due process. He also claims that United Transportation Union's General Chairman was without authority to enter into such agreements on his own. To claim as the defendant Union does in its brief that plaintiff's failure to challenge the authority of the General Chairman within the Union's appellate procedure precludes plaintiff from doing so now ignores the two well-established principles of law discussed above that one is not required to pursue a remedy which would prove futile, or to pursue an administrative remedy where a violation of constitutional rights is alleged.

Furthermore, to contend that plaintiff was required to challenge the authority of the General Chairman within the Union under the procedures outlined in the United Transportation Union's Constitution presumes that plaintiff had

knowledge of same within the prescribed time to appeal.

The only proof in the record of the Court below is to the contrary.

Defendants' reliance upon cases such as Andrews v. Louisville & N R Co., 92 S.Ct. 1562, 406 U.S. 320 (1972) which require the exhaustion of administrative remedies ignores the exceptions to the doctrine outlined in the Glover case, wupra, under which the within action falls. Briefly, plaintiff Mills is entitled to pursue this action and not required to exhaust administrative remedies because (1) it involves a suit by an employee against not only his employer but his Union as well; (2) asserts a claim of denial of due process through State action; (3) involves a challenge to the authority of the General Chairman of the Union to have agreed to the very procedure under which plaintiff claims to have suffered a denial of due process and (4) alleges that the exhaustion of administrative remedies would be futile.

Respectfully submitted,

JOSEPH P. NAPOLI  
Attorney for Plaintiff-Appellant



AFFIDAVIT OF SERVICE

STATE OF NEW YORK)  
: SS.:  
COUNTY OF NEW YORK)

REGINA WEINKOFF, being duly sworn, deposes and says that deponent is associated with the attorney for the plaintiff herein.

That on the 24 day of March, 1975 deponent served the within Reply Brief of Plaintiff-Appellant, Raymond J. Mills

upon the attorneys for the defendants by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at #100 Church Street, in the City, County and State of New York directed to said attorneys as follows:

Thomas Higgins, Esq.  
Attorney for United Transportation Union  
200 South Service Road, Roslyn Heights, New York

George M. Onken, Esq.  
Jamaica Station, Jamaica, New York

those being the respective addresses within the State designated by them for that purpose upon the preceding papers in this action, or the respective places where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 18 years.

Regina Weinkoff  
Regina Weinkoff

Sworn to before me this

24 day of March, 1975

Linda E. Gaudiosi

LINDA E. GAUDIOSI  
Notary Public, State of New York  
No. 31-6472180  
Qualified in New York County  
Commission Expires March 30, 1976